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No. 91-1384

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

CHARLES D. BATES, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In opposing review of the decision below, respondents do not take issue with any of the fundamental propositions that underlie our petition. They do not deny that the courts of appeals are in conflict on the question whether parties may condition a post-judgment settlement on a vacatur of the judgment that precludes its use as a future source of collateral estoppel. They do not deny that the Ninth Circuit's decision according collateral effect to a vacated judgment is irreconcilable with the holdings of virtually all other courts of appeals that "a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). And

they do not deny that this case would have had a different outcome outside the Ninth Circuit: in the Second and Federal (and, we submit, the Fourth, Tenth, and Eleventh Circuits), collateral use of the *Amos* judgment would not have been permitted; in the Third, Seventh, and D.C. Circuits, the *Amos* judgment would not have been vacated in the first place and Unocal would have retained its right to appeal. In these circumstances, where the circuits are split on a recurring issue of great practical importance, the decision below plainly warrants further review.

1. In opposing review of the first question presented in the petition, respondents maintain that Unocal "has nothing more than an academic interest in the 'conflict in the circuits' it identifies" (Br. in Opp. 6) because the *Amos* judgment was in fact vacated. This contention simply misses the relevant point. As the first question itself states, and as we explain in the petition (at 16-17), the meaningful conflict in the circuits concerns the circumstances in which judgments must be vacated in a manner that "eliminate[s] [their] collateral estoppel effects." Pet. i. It therefore is nonsensical for respondents to suggest that the issues of entitlement to vacatur and of the vacated judgment's estoppel effects are "completely distinct." Br. in Opp. 6. In fact, the courts of appeals that grant vacatur upon settlement do so for the express purpose of *eliminating* the judgments' collateral effects (see Pet. 22-23), whereas the courts that refuse to vacate do so to *preserve* the judgments' collateral consequences. See *id.* at 23.[1] Thus,

[1] As the Seventh Circuit recently explained regarding its decision in *In re Memorial Hospital of Iowa County, Inc.*, 862

while the questions of vacatur and estoppel may be theoretically separate (since a vacatur's effect on estoppel would be *felt* in the second case when estoppel was invoked), the courts' understanding of the *effect* of vacatur has dictated their rules on the *grant* of vacatur.

Respondents attempt to obscure this seemingly inarguable proposition here by focusing on the peculiarity of the Ninth Circuit's approach. Alone among the courts of appeals, the Ninth Circuit has held that the questions whether to vacate and whether to accord a vacated judgment collateral effect may be decided at different times; in other circuits, the decision to vacate is itself determinative of the estoppel issue. But the decision below surely should not be shielded from review by the very aberrance of its rule.[2]

F.2d 1299 (1988), which announced that Circuit's rule precluding vacatur upon settlement, "[had] we [vacated the judgment], then—as our opinion made clear—the judgment could not have been used in future litigation. Indeed this was one of the considerations that moved us not to vacate it." *Pontarelli Limousine, Inc.* v. *City of Chicago*, 929 F.2d 339, 340 (7th Cir. 1991).

[2] Respondents suggest that review is not warranted because the opinion below "is just a technical response to a unique problem" created when a district court vacates a judgment without reference to the Ninth Circuit's *Ringsby* factors. Br. in Opp. 7. This is an unduly modest statement of the decision's scope. The court also held, of course, that a judgment does "not lose preclusive effect simply because it was vacated." Pet. App. 8a. And the court implemented its longstanding rule, first announced in *Ringsby*, that the parties are not entitled to effectuate a settlement pending appeal that requires vacatur of the judgment. Indeed, as we explain in the petition (at 24-25), the court of appeals' procedural holding—that the questions of vacatur and of estoppel may be decided at different times—greatly adds to the significance of its decision by chilling the settlement of cases in *other* circuits.

2. Respondents oppose consideration of the second question presented in the petition by asserting that the court below applied Oregon law in determining the collateral effect of the vacated *Amos* judgment; they label as *dicta* the "statements in the court's opinion regarding the court's view of the proper federal rule of estoppel." Br. in Opp. 7. This transparent attempt to insulate the decision below from review is manifestly unsound. The Ninth Circuit did opine that, in a diversity action, the forum state's law determines the preclusive effect of a vacated judgment. Pet. App. 5a. But the court immediately went on to declare that Oregon "would apply *federal* law to determine the preclusive effect of a prior federal judgment," and the court "[t]herefore * * * appl[ied] federal law to determine the preclusive effect of the vacated *Amos* judgment." *Id.* (emphasis added). See *id.* at 6a-12a.[3] This application of federal law was hardly *dicta*. The court's understanding of federal law controlled the outcome here and will be binding in future Ninth Circuit nondiversity cases. And insofar as the court of appeals can be said to have applied state law,[4] it is of course elementary that

[3] Respondents' assertion that the district court "concluded that collateral estoppel was appropriate *under Oregon law*, and proceeded to apply it" (Br. in Opp. 8 (emphasis in original)) is similarly misleading. In fact, the district judge concluded: "There is a split of authority on whether federal or state law applies to determine whether to allow offensive collateral estoppel. * * * However, the outcome here would be the same under federal or state law." Pet. App. 20a. The court's subsequent discussion both of collateral estoppel and of the effect of vacatur looked entirely to federal law. See *id.* at 20a-28a.

[4] In fact, the court below plainly erred in stating that state law determines the preclusive effect of a federal judgment

this "Court may pass on the federal question that has been incorporated in the state law." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 172 (6th ed. 1986). See *Three Affiliated Tribes* v. *Wold*

(even a federal diversity judgment) in a subsequent diversity action. Although this Court has left the issue open (see *Heiser* v. *Woodruff*, 327 U.S. 726, 731-732 (1946)), a "burgeoning majority of federal courts" apply federal rules in diversity cases to determine the preclusive effect of prior federal judgments. *Hunt* v. *Liberty Lobby, Inc.*, 707 F.2d 1493, 1496 (D.C. Cir. 1983). These courts recognize that "it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights." *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962). See, *e.g.*, *Precision Air Parts, Inc.* v. *Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985); *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 337 (5th Cir. 1982); *Held* v. *Mitsubishi Aircraft International, Inc.*, 672 F. Supp. 369, 387 (D. Minn. 1987); *Restatement (Second) of Judgments* § 87, comment b, at 317 (1980) ("Some aspects of the rules of res judicata reflect primarily procedural policies. Thus, the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function. * * * These should be determined by a federal rule"); IA Pt. 2 J. Moore, W. Taggart, A. Vestal, J. Wicker, & B. Ringle, *Moore's Federal Practice* ¶ 0.311[2], at 3179-3182 (1990). We did not expressly challenge the Ninth Circuit's conclusion on this point only because it had no bearing on the outcome below —since the court, after all, did apply a federal rule of preclusion. But the choice of law question, should the Court choose to reach it, plainly is subsumed within the second question presented in the petition. It should be added that respondents are incorrect in stating "Unocal argued at the court of appeals that Oregon law governed this issue." Br. in Opp. 6. In fact, *both* parties were of the view that federal law controlled. Virtually all of Unocal's argument addressed federal law (see Appellant's C.A. Br. 18-32, 34-35); for their part, respondents opined that "[f]ederal law controls this question." Appellees' C.A. Br. 16 n.6.

Engineering, 467 U.S. 138, 152 (1984); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979). It therefore is beside the point that the federal question settled below, which otherwise plainly warrants review, was decided in the context of a diversity action.

3. Respondents' suggestion (Br. in Opp. 7-11) that the questions presented in this case are insignificant borders on the silly. Respondents themselves acknowledge (*id.* at 9 & n.9) that the issues here have been addressed in elaborate opinions by no fewer than six courts of appeals; three other circuits have issued shorter published orders or opinions that granted vacatur on the authority of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).[5] Not surpris-

[5] Respondents assert that there is "no[] indicat[ion] that * * * these circuits plan to vacate all similar cases." Br. in Opp. 9. But the courts' invocation of *Munsingwear* suggests that they believe themselves obligated by mootness principles to vacate judgments upon settlement. Indeed, since we filed the petition the Eleventh Circuit has vacated another decision upon settlement. *Baxter Healthcare Corp.* v. *Healthdyne, Inc.*, No. 90-8370 (11th Cir. Mar. 5, 1992). And the Tenth Circuit has recognized that, upon compliance with the terms of a settlement and a request for vacatur, "all disputed issues involved in the pending appeals * * * become moot." *Tosco Corp.* v. *Hodel*, 826 F.2d 948, 948 (10th Cir. 1987). The court therefore has held in such a case that, "under the decisions of the United States Supreme Court in *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983), and in *Great Western Sugar Co. v. Nelson*, 422 U.S. 92 (1979), it is * * * this court's duty to vacate the judgments appealed from as moot." *Id.* (parallel citations omitted). The district court decision cited by respondents (Br. in Opp. 9, citing *Russell* v. *Turnbaugh*, 774 F. Supp. 597 (D. Colo. 1991), app. dismissed, No. 91-1121, 1992 U.S. App. LEXIS 2683 (10th Cir. Feb. 25, 1992)) does not mention the controlling Tenth Circuit precedent and is in fact inconsistent with the "duty" recognized by its court of appeals.

ingly, these published decisions are only the tip of the iceberg, settling the treatment of an issue that arises "often" (*Memorial Hospital*, 862 F.2d at 1300) or "routinely" (*Clarendon Ltd.* v. *Nu-West Industries, Inc.*, 936 F.2d 127, 129 (3d Cir. 1991)) and typically is resolved by unpublished order. And while respondents purport to see no need for a uniform national rule on the availability and effect of vacatur (see Br. in Opp. 10), they essentially are asking the Court to disregard what they acknowledge to be outcome-determinative differences in the interpretations placed by the lower courts both upon this Court's decisions and upon provisions of federal law. See Pet. 17.[6]

Indeed, respondents implicitly acknowledge the force of one of our principal arguments for review. We noted in the petition (at 23-25) that the Ninth Circuit's rule would allow collateral effect to be

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[6] The statistics invoked by respondents (Br. in Opp. 10 n.11) to demonstrate that the Ninth Circuit's rule has not impeded settlement are less than probative. There is no way to determine how many of the cases that have been voluntarily dismissed were settled during appeal, and thus no way of knowing how the Ninth Circuit's rate of post-judgment settlements compares to that of other courts. At the same time, one would expect the Ninth Circuit to have a far better than average settlement rate, notwithstanding its peculiar *Ringsby* rule, because it is one of the courts of appeals to have established a regularized settlement program. See Pet. 3 n.1, 8-9. Indeed, if even a small fraction of the several thousand cases cited by respondents are affected by the issues here, this case will have very substantial practical importance. And the suggestion (Br. in Opp. 11) that this Court should defer consideration of the issues presented here so that the circuits may "serve as laboratories" is wholly out of place in this case; nine circuits already have passed upon the issue, which is as ripe now for this Court's review as it will ever be.

given to judgments that have been vacated in *other* circuits if (as invariably will be the case) the *Ringsby* factors were not considered at the time of vacatur. Respondents do not deny that the decision below would permit estoppel in such circumstances; they assert only that such a case has not yet arisen. See Br. in Opp. 9-10, 11. But that is no answer: there has been no such case because the Ninth Circuit's rule on the effect of vacatur was first announced in the decision below, and there will not be such a case in the future because no prudent litigant whose suit involves an issue that might recur in the Ninth Circuit ever will enter into a post-judgment settlement conditioned on vacatur. Immediate review of the decision below therefore is imperative.[7]

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[7] Attempting to minimize the importance of the decision below, respondents assert that the preclusive effect of federal judgments "must be resolved, at least in a diversity case, on the basis of state law. Thus, whatever uncertainty exists, arises from the inability to know what state may be the forum for subsequent litigation or what its rule of law will be." Br. in Opp. 11. Even if this observation otherwise had merit it would not militate against review of the decision below, which avowedly involved the application of a federal rule of preclusion. But in any event, as we note above (at 4-5 n.4), most courts do (and *all* courts should) apply federal rules to determine the preclusive effect of federal judgments in diversity cases. As a consequence, if this Court sets aside the decision below, no federal litigant will face the uncertainty described by respondents. We also note that respondents are incorrect in asserting that Unocal "took 'a calculated risk' * * * that state law would permit relitigation." Br. in Opp. 7-8. We explain earlier on (at 4-5 n.4) that, in the proceedings below, Unocal (and, for that matter, respondents here) believed that federal law controlled the estoppel question; Unocal certainly did not think that it was exposing itself to the vagaries of state estoppel law by entering into the *Amos* settlement.

4. Finally, respondents' comments on the equities—in particular, their assertion that Unocal took a "calculated risk" in seeking vacatur—are insupportable. As an initial matter, it would be beside the point even if Unocal had made a calculation of the sort alleged by respondents; it would remain true that taking such a risk is unnecessary in the Second, Federal, Fourth, Tenth, and Eleventh Circuits, and is impossible in the Third, Seventh, and D.C. Circuits. Respondents offer no reason why the Ninth Circuit, and the Ninth Circuit alone, should impose this risk on litigants in federal cases.

But in any event, respondents misstate the circumstances here. Unocal certainly was aware that neither the district court nor the Ninth Circuit could guarantee that other courts would refrain from granting the vacated *Amos* judgment collateral effect, although at the time it requested vacatur Unocal made clear its view that such a use of the vacated judgment would be "illicit." E.R. 121.[8] Having advised the district court of its concerns in this regard, however, Unocal had every reason to assume that the very judge who vacated the *Amos* judgment—thus bringing about the dismissal of Unocal's appeal—would not himself give that judgment estoppel effect. At the same time, respondents' repeated suggestions that Unocal somehow acted in bad faith by trying "to have it both ways" (Br. in Opp. 8) or by making a "calculated decision to finesse a grant of vacatur" (*id.* at 12) have absolutely no basis in the record. Unocal and the *Amos* plaintiffs *jointly* filed a routine motion for

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[8] Had Unocal been estopped in such a court, it doubtless would have sought review in this Court on the ground that vacated judgments cannot have collateral effects.

vacatur with the district court; they surely were entitled to assume that, in acting on the motion, the court would be familiar with and would apply the controlling Ninth Circuit precedent.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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